

89-331 (1)

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO  
CLERK

NO. 89-

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

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ALBERT ALVIN CANO,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE ALABAMA COURT OF CRIMINAL APPEALS

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## QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE INTENTIONALLY DESTROYED THE SEIZED COCAINE AND A CRUCIAL TAPE RECORDING MADE BY POLICE WAS UNAVAILABLE, WHERE THIS EVIDENCE WOULD HAVE BEEN FAVORABLE TO THE DEFENSE?

II. WHETHER THE DEFENDANT WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE PROSECUTOR WAS PERMITTED TO REFER TO THE DEFENDANT'S ILLEGAL ALIENAGE AND SUGGEST THAT THE DEFENDANT'S FAMILY WAS INVOLVED IN DRUG TRAFFICKING?

III. WHETHER A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO HAVE THE JURY INSTRUCTED ON LESSER INCLUDED OFFENSES?

IV. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE REFUSED TO TREAT HIM IN THE SAME MANNER FOR PLEA AND SENTENCING PURPOSES AS HIS MORE CULPABLE DEFENDANT, AND WHEN THE COURT IMPOSED A DISPROPORTIONATE SENTENCE?

OVERVIEW SUMMARY

I. WHETHER PETITIONER WAS DENIED THE  
PROTECTION OF LAW AND CONSTITUTIONAL RIGHTS  
WHEN THE STATE INTENTIONALLY DESTROYED  
THE EVIDENCE AND A CRIMINAL CASE  
PROSECUTED BY POLICE WHO UNLAWFULLY  
SEIZED THE EVIDENCE WOULD HAVE  
BEEN FAVORABLE TO THE DEFENDANT

II. WHETHER THE DEFENDANT WAS DEPRIVED  
OF CONSTITUTIONAL RIGHTS WHEN THE  
PROSECUTION WAS OBLIGATED TO RETURN TO  
THE DEFENDANT'S ILLEGAL ALIBI AND  
FOUNDED THAT THE DEFENDANT'S FAMILY WAS  
INVOLVED IN DRUG TRAFFICKING

III. WHETHER A DEFENDANT IN A CRIMINAL  
CASE IS OBLIGED TO MAKE THE BEST  
EFFORTS TO SECURE THE EVIDENCE

IV. WHETHER PETITIONER WAS DENIED THE  
PROTECTION OF LAW AND CONSTITUTIONAL RIGHTS  
WHEN THE STATE REFUSED TO RETURN TO THE  
DEFENDANT THE EVIDENCE FOR HIS AND HIS WIFE'S  
DEFENSE AND HIS WIFE'S EVIDENCE WAS  
DESTROYED, AND WHEN THE COURT IGNORED A  
DISPROPORTIONATE RESPONSE



## LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are the Petitioner, Albert Alvin Cano, his family, and the State of Alabama.

LIST OF INTERVIEW PERSONS

The only persons and entities having an interest in the outcome of this case are the petitioner, Albert Alvin Lane, his family, and the State of Missouri.

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2. THE PETITIONER WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE WRIT OF HABEAS CORPUS WAS DENIED TO THE PETITIONER. ILLEGAL ALLEGATIONS AND SUGGESTIONS THAT THE PETITIONER'S FAMILY WAS INVOLVED IN DRUG TRAFFICKING.

3. A PETITIONER IN A PETITION CASE IS ENTITLED TO HAVE THE WRIT OF HABEAS CORPUS GRANTED OVERSIGHT.

IV. PETITIONER WAS DENIED DUE PROCESS  
OF LAW AND FUNDAMENTAL FAIRNESS WHEN  
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TOWN HALL FOR THE YEAR AND THE  
REPORTS OF THE VARIOUS COMMITTEES  
WAS READ AND WERE THE FOLLOWING  
RESOLUTIONS PASSED.

CONCERNING THE TOWN HALL.

RESOLVED THAT THE TOWN HALL

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ALBERT ALVIN CANO,  
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Petitioner, Albert Alvin Cano, petitions for a writ of certiorari to review the judgment and decision of the Alabama Court of Criminal Appeals, Fourth Division, in Case No. 4 Div.964, which affirmed his criminal conviction and sentence from the Houston Circuit Court. Cano v. State, 543 So.2d 724 (Ala.Crim.App. 1989).



### OPINIONS BELOW

The Alabama Court of Criminal Appeals announced its decision on March 31, 1989. Cano v. State, 543 So.2d 724 (Ala.Crim.App. 1989). This decision is reproduced in the Appendix to this Petition. The trial court did not render any written opinions specifically directed to the questions presented in this certiorari petition.

### JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). For purposes of Supreme Court review, the Alabama Court of Criminal Appeals is the court of final review in Alabama criminal cases, and certiorari review in the Alabama Supreme Court is not available in this case, which does not involve any of the jurisdictional elements necessary for such review. Ala.R.App.P. 39(c).

## EXTRINSIC EVIDENCE

The Alabama Court of Criminal Appeals announced its decision on March 21, 1968, (Case No. 158, 442 Ala. 215 (A) 2 Cr. App. 1968). This decision is reproduced in the Appendix to this Petition. The trial court did not render any written opinion except to orally answer the questions presented in this extrinsic petition.

## CONCLUSION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. 2254(1) for purposes of habeas corpus review of the Alabama Court of Criminal Appeals in the case of John Peter in which criminal court of final review in Alabama Criminal Court. The petition is based on the facts and circumstances set forth in this case, which have not been fully set forth in the Alabama Court of Criminal Appeals. The petition is based on the facts and circumstances set forth in this case, which have not been fully set forth in the Alabama Court of Criminal Appeals. The petition is based on the facts and circumstances set forth in this case, which have not been fully set forth in the Alabama Court of Criminal Appeals.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

### **1. U.S. Constitution, Amendment V:**

**No person shall... be deprived of life, liberty, or property, without due process of law...**

### **2. U.S. Constitution, Amendment VIII:**

**Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.**

### **3. U.S. Constitution, Amendment XIV:**

**All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its**

CONSTITUTIONAL PROVISIONS

1. U.S. Constitution, Amendment V:  
No person shall... be deprived of life,  
liberty, or property, without due process  
of law.

2. U.S. Constitution, Amendment VII:  
The right of trial by jury shall not be removed,  
nor shall the right of the people to be heard by  
them be infringed.

3. U.S. Constitution, Amendment XI:  
All persons who are citizens of the  
United States, and subject to the jurisdiction thereof, are citizens of the United  
States and of the State wherein they reside.  
No State shall make or enforce any law which  
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of citizens of the United States; nor shall  
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of law.



jurisdiction the equal protection of the law.

**STATEMENT OF THE CASE**

Albert Alvin Cano was indicted by the Houston County grand jury during its February 1981 term for trafficking in more than 400 grams of cocaine, in violation of Alabama Code §20-2-80, the Alabama Drug Trafficking Act. Indicted with Cano were Mauricio Noguera and Jimmy Talmadge Farrell. The indictment was returned on February 13, 1981. On April 24, 1981, the conditional forfeiture of Cano's bond was ordered due to his failure to appear for arraignment.

Cano was next located in Miami, Florida and brought back to the jurisdiction of the Houston County Circuit Court in May 1987. At that time, Cano's counsel filed a written plea of not guilty and a waiver of arraignment. Defense counsel filed a number of



pretrial motions, including a motion for disclosure of impeaching evidence, a motion to compel production, a motion to suppress evidence, and a motion to dismiss the indictment. Cano also requested "fair treatment" from the court by reason of codefendant Farrell having been permitted to plead to a reduced charge of cocaine possession. The court, through Circuit Judge Crespi, denied the motion for fair treatment and the motion to dismiss, but granted the discovery motion in part.

Jury trial began on September 15, 1987, before Circuit Judge Storey. At the opening of the trial, defense counsel moved for a dismissal because of the state's destruction of the seized cocaine and an undercover, surreptitious tape recording of a portion of the events giving rise to the charges, and because the state had failed to produce



all requested discovery in a timely fashion. The court, expectedly, denied the motion and the case proceeded to trial. During the prosecutor's opening statement, defense counsel was obligated to object on one occasion, but the reason for that objection does not appear in the appellate record because the defense was not allowed to supplement the requested transcripts with additional portions of the trial. At trial, the state called five witnesses, and then rested. The Defendant testified on his own behalf. The State called no rebuttal witnesses.

At the end of the evidence and argument, the court instructed the jury, but refused to instruct as to requested lesser offenses. The jury found Cano guilty as charged. Cano waived preparation of a presentence investigation report, and Judge



Storey immediately sentenced him to imprisonment for a period of twenty-one years, with a fifteen year minimum mandatory, and imposed a \$250,000 fine.

Cano perfected his appeal. He also submitted an affidavit of financial hardship, resulting in the entry of an order authorizing preparation of a transcript at no cost to him. Cano raised five issues in that appeal, to wit: (1) a denial of due process when the State destroyed crucial evidence; (2) denial of a lesser included offense instruction; (3) fundamentally unfair comments by the prosecutor; (4) denial of fairness by reason of the refusal to permit supplementation of the appellate record with a missing transcript; and (5) denial of due process when the trial court refused to treat Cano in the same manner for sentencing purposes as the codefendant. The

Story drastically sentenced him to death  
for a period of twenty-one years,  
with a fifteen year minimum sentence, and  
imposed a \$100,000 fine.

Cane rejected his appeal. He also  
submitted an affidavit of financial facts  
ship, resulting in the entry of an order  
authorizing preparation of a transcript of  
no cost to him. Cane asked the judge to  
that appeal, to wit: (1) a denial of one  
process when the State displayed credible  
evidence; (2) denial of a lesser sentence  
wherein the State presented (a) testimony  
which was not by the defendant; (b)  
denial of evidence by reason of the refusal  
to permit suppression of the evidence  
which was a ruling contrary to the  
denial of one process when the State  
refused to let Cane in the case. The  
sentence was imposed as the minimum.



appellate court, in a written decision, affirmed Cano's conviction and sentence. Cano v. State, 543 So.2d 724 (Ala.Crim.App. 1989).

As presented at trial, the events leading to this case began in early 1981, when undercover Alabama law enforcement officers succeeded in arranging the purchase of four pounds of cocaine in Houston County.<sup>1/</sup> The suppliers of the cocaine were Jimmy Farrell, a local resident with a history of controlled substance violations, Mauricio Noguera, and Cano.

James Ward, a member of the Alabama Bureau of Investigation, Narcotics Unit, investigated this case, together with ABI Officer Rhegness, Lt. Leroy Wood of the

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<sup>1/</sup> The investigation was considered so important that Governor Fob James participated in the actual arrest for this largest cocaine seizure in Alabama. The jury was so informed of this irrelevant fact.

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mitted in the actual arrest for this incident  
cocaine seizure in Alabama. The jury was  
so informed of this relevant fact.

Houston County Sheriff's Department, and Bobby Sorrells and Wallace Williams of the Dothan Police Department. On January 2, 1981, Ward met with Bill Rhegness to discuss an undercover drug investigation. Both officers had been working in an undercover surveillance capacity, using pseudonyms for their undercover characters. The officers were working with a paid confidential informant named Will Johns, who introduced them to James Talmadge Farrell, a known drug dealer.

Johns had arranged a meeting with Farrell for that day at the Ramada Inn in Dothan. At that meeting, Ward met with a Colombian named Mauricio Noguera. Ward negotiated for the delivery of four kilograms of cocaine with Farrell, Johns, and Noguera, at a price of \$55,000 per kilo. These negotiations were surreptitiously

Houston County Sheriff's Department, and Bobby Gortals and Wallace Williams of the Cochran Police Department. On January 1, 1981, Ward met with Bill Rhoads to discuss an undercover drug investigation. Both officers had been working in an undercover surveillance capacity, using pseudonyms for their undercover characters. The officers were working with a paid confidential informant named Bill Johns, who introduced them to James Fainbridge Fainbridge, a known drug dealer.

Johns had arranged a meeting with Fainbridge for that day at the Kananda Inn in Cochran. At that meeting, Ward met with a Colombian named Narciso Rodriguez. Ward reported for the delivery of four kilos of cocaine with Fainbridge, Johns, and Rodriguez, at a price of \$25,000 per kilo. These negotiations were surreptitiously

recorded by police monitoring equipment located in a nearby room. Ward displayed the money as a sign of good faith, which led to Noguera and Farrell explaining that they had to drive back to Tallahassee to pick up the cocaine.

Noguera and Farrell returned with Cano, who stated that he had driven "the drugs from Miami." Cano produced a cocaine sample. There was no testimony that Cano had taken this sample from the larger quantity of cocaine which had been negotiated by Noguera and Farrell. Rhegness field tested the substance as cocaine. Cano informed Ward that he had brought the contraband from Miami, but only had two kilograms with him. Because of the shortage in quantity, the total sale price was set at \$110,000. The purchase price had been negotiated in the prior meeting.

recounted by police monitoring equipment located in a nearby room. Ward displayed the money as a sign of good faith, which led to Hodgson and Farnell explaining that they had to drive back to Tallahassee to pick up the cocaine.

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Cano then left the room for the purpose of obtaining the cocaine, while Farrell stayed in the hotel room with Ward and Rhegness. Within minutes, Cano returned carrying a shopping bag containing two kilogram packages of cocaine wrapped in plastic. At this point, surveillance police officers quickly converged on the scene and arrested Cano and Farrell inside the room and Noguera at an outside telephone booth. Ward determined that Cano was a Colombian who did not have a United States visa, but he lived in Miami, Florida.

Rhegness took custody of the cocaine, and had it photographed. Those photographs were introduced into evidence as State's Exhibits One and Two.<sup>2/</sup>

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<sup>2/</sup> The cocaine itself was never produced at trial. Rhegness had taken the cocaine to the crime lab for analysis, and on April 9, 1982, received a destruction of evidence authorization card from Chemist Saloom. (continued...)



Cano then left the room for the purpose  
of obtaining the cocaine. Within a short  
time he returned to the hotel room with  
a package containing two  
Klorox packages of cocaine wrapped in  
plastic. At this point, surveillance police  
officers quickly converged on the scene and  
arrested Cano and returned him to the room  
and removed him to the outside telephone booth.  
Ward ascertained that Cano was a Colombian  
who did not have a United States visa, but  
he lived in Miami, Florida.

Stagnara took custody of the cocaine  
and had it photographed. These photographs  
were introduced into evidence as Stagnara's  
Exhibits One and Two.

17. The cocaine itself was never produced  
to trial. Stagnara had taken the cocaine  
to the office for analysis, and on April  
2, 1963, received a certification of analysis  
authorizing him to use United States  
(Continued...)



Soon after their arrests, Cano and Noguera were released on bond. Circuit Court Clerk Trant testified at trial that Cano posted his bond on January 20, 1981, and his bond was forfeited on March 2, 1981. Cano was extradited from Miami and rearrested on May 1, 1987.

Alvin Cano testified on his own behalf at trial. He was born in Colombia and attended college in New York City. He first came to the United States with his family in 1965, and has been living in the United

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2/ (...continued)

Rhegness authorized the destruction of the cocaine, even though neither Cano nor Noguera had yet gone to trial. Lab policy was to retain evidence for two years. Saloom had analyzed the cocaine, and determined that the substance was 1,984 grams of cocaine. When he destroyed the cocaine, Saloom thought that the Noguera and Cano cases had been resolved. Saloom produced two different destruction authorization forms, although Saloom took the position that they were copies of a single form. No court ever authorized the destruction of the evidence.



States almost continuously since then. His visa permitted him to remain in the country.

Cano first met Noguera at a Christmas party in December 1980. Noguera went to college in Tallahassee, Florida. On New Year's Day, Cano's brother Cesar asked Cano if he would drive from Miami to Tallahassee for Noguera. Cano did so, and met with Noguera in Tallahassee, and there was introduced to Farrell. At Farrell's suggestion, the three of them drove to Dothan, which was a fifteen to twenty minute drive away. Cano had no idea he was going to Alabama. Upon their arrival at a hotel, Cano saw Rhegness and Ward for the first time. Cano knew at the time that drugs were being transported in the car, but had no intention of trafficking in drugs in Alabama.

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Cano first met Hugueta at a Christmas  
party in December 1980. Hugueta went to  
college in Tallahassee, Florida. On New  
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if he would drive from Miami to Tallahassee  
for Hugueta. Cano did so, and met with  
Hugueta in Tallahassee, and there was  
introduced to Hugueta. As Hugueta's wife,  
Yvette, the three of them drove to Dallas,  
which was a fifteen to twenty minute drive  
away. Cano had no idea he was going to  
Alaska. Upon their arrival at a hotel,  
Cano was informed and went for the first  
time. Cano knew at the time that there were  
being transported in the car, but had no  
information or knowledge in regard to them.

At Farrell's request, Cano gave a cocaine sample to the undercover officers and told these prospective purchasers to talk with Farrell about the intended transaction. Cano then brought in the two kilogram packages of cocaine. Cano was arrested soon afterwards. He had never been involved with drugs before.

After his arrest and release on bond, Cano received permission to return to Fort Lauderdale, Florida. He didn't return to Alabama because his lawyer informed him that Noguera had fled and the judge wanted Cano to return to court immediately. Cano became scared and left the country. In 1987, he was extradited to Alabama from Miami.

At Farrell's request, Cano gave a  
coaching camp to the undercover officers  
and told them progressive purchases to  
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## REASONS FOR GRANTING THE WRIT

- I. PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE INTENTIONALLY DESTROYED THE SEIZED COCAINE AND A CRUCIAL TAPE RECORDING MADE BY POLICE WAS UNAVAILABLE, WHERE THIS EVIDENCE WOULD HAVE BEEN FAVORABLE TO THE DEFENSE.

This case raises a fundamental question of the extent to which law enforcement authorities can destroy evidence and render evidence unavailable to the defense, when that destroyed evidence could have contributed to creating a reasonable doubt of his guilt. In this case, the prosecution charged Cano with trafficking in cocaine, and then limited its proof about the cocaine to testimony concerning the chemical analysis. The State did not produce the cocaine or make the cocaine available to Cano's counsel, because the contraband had been intentionally destroyed after Cano's arrest but before his trial. The des-

## REASONS FOR GRANTING THE PETIT

1. PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE INTENTIONALLY DESTROYED THE BEING COCAINE AND A CRUCIAL TAPE RECORDING MADE BY POLICE WAS UNAVAILABLE, WHERE THIS EVIDENCE WOULD HAVE BEEN FAVORABLE TO THE DEFENSE.

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truction of all the seized cocaine was done contrary to the internal rule of the Alabama Bureau of Investigations, which permitted destruction only after two years from the date of the seizure. Also, the law enforcement authorities never sought permission of a court before destroying the evidence.

The prosecution also introduced testimony about a meeting between Cano, former codefendant Farrell, and two undercover officers. Although the meeting was recorded, the tape recording itself was "unavailable." Yet, the law enforcement officers were permitted to testify about that meeting, and stated that Cano discussed the cocaine sale and negotiated the sales price. Cano flatly denied that version at trial, taking the position that he had no negotiations with law enforcement officers, and that he had simply carried the bag con-

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contrary to the internal rule of the Alaska  
Bureau of Investigation, which permitted  
destruction only after two years from the  
date of the seizure. Also, the law enforce-  
ment authorities never sought permission of  
a court before destroying the evidence.

The prosecution also introduced tes-  
timony about a meeting between Cano, former  
consul general in Seattle, and two unknown  
officers. Although the meeting was secret,  
the tape recording itself was "unavail-  
able". Yet, the law enforcement officers  
were permitted to testify about that meet-  
ing, and stated that Cano discussed the  
cocaine sale and negotiated the sales price.  
Cano flatly denied that version of trial.  
Taking the position that he had no nego-  
tiations with law enforcement officers, and  
that he had simply carried the sale con-

taining drugs at the direction of Noguera. Because the tape recording was "unavailable," Cano was unable to challenge the truth of the officers' testimony and could not present favorable evidence of his actual statements made during the meeting.

Based on the destruction and unavailability of these two crucial items of evidence, items which were featured as a major part of the prosecution's case, defense counsel moved to dismiss the charges or to obtain an order in limine precluding the prosecution from adducing any testimony concerning the missing evidence. The trial court denied that motion. On appeal, the court affirmed, based on its view that "the chances are very slim that the cocaine in this case was exculpatory" and that "the loss of the tape recording did not affect the outcome of this ... trial." By so



ruling, both the trial and appellate courts violated Cano's constitutional right to fundamental fairness and due process, particularly since the destruction and loss of this evidence left him with absolutely no means of challenging the prosecution's case or of introducing favorable evidence which would have changed the outcome of the trial.

The Due Process Clause of the Fourteenth Amendment requires that prosecution authorities disclose to criminal defendants favorable evidence that is material either to guilt or to punishment. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Brady set forth the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or

relying both the trial and appellate courts  
violated Cano's constitutional right to  
fundamental fairness and due process, partic-  
ularly since the destruction and loss of  
this evidence left him with absolutely no  
means of challenging the prosecution's case  
or of introducing favorable evidence which  
would have changed the outcome of the trial.  
The due process clause of the four-  
teenth amendment requires that prosecution  
authorities adhere to criminal due process  
favorable evidence that is material either  
to guilt or to punishment. United States  
v. Jones, 462 U.S. 58, 62 A.Ct. 1102 (1983);  
Brady v. Maryland, 353 U.S. 83, 87 A.Ct.  
83 (1957). Brady has been the basis  
of claims that any suppression by the prose-  
cution of evidence favorable to an accused  
which might have changed the outcome of the  
trial is a violation of the due process clause  
of the fourteenth amendment to guilt or

punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196.

Application of this constitutional principle to the circumstances of this case requires the conclusion that Petitioner Cano's due process rights were violated when the State, by its own actions, rendered unavailable two crucial pieces of evidence, both of which very likely would have established Cano's innocence. In this case, defense counsel affirmatively demanded production of all tangible objects in the State's possession and all evidence taken from the Defendant, including the contraband and the tape recording. Not only did the State ignore this defense demand and a subsequent court order requiring the State to produce all discoverable evidence, it also disregarded an internal law enforcement

prejudgment, irrespective of the good faith  
or bad faith of the government. 175 U.S.  
at 57, 58 & 59. at 1198.

Application of this constitutional  
principle to the circumstances of this case  
requires the conclusion that petitioner  
cannot sue because rights were violated when  
the State, by its own actions, conducted  
unavoidable two crucial phases of evidence,  
both of which were likely to have been  
distorted through its action. In this case,  
defense counsel affirmatively demanded  
production of all tangible objects in the  
State's possession and all witnesses taken  
from the defendant, including the defendant  
and the tape recording. Not only did the  
State ignore this demand and a  
subsequent court order requiring the State  
to produce all identifiable evidence, it  
also disregarded its actual law enforcement



rule which obligated the police laboratory to retain evidence for two years from the date of seizure.

Since the State ignored the specific defense demand for this evidence and violated its own internal procedures concerning retention and availability of evidence, the constitutional principles enunciated in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985), and United States v. Agurs, supra, compel a conclusion that the Alabama Court of Criminal Appeals disregarded controlling precepts in rejecting Cano's claim. Here, not only did the defense request evidence, but also the controlling Alabama procedure constituted an additional protection to a defendant. Since this procedure has the clear result of making evidence available to a defendant, so that the evidence can be used to de-

to which obligated the police department  
to retain evidence for the years five and  
date of seizure.

Since the State ignored the scientific  
evidence known for this evidence and  
failed to use laboratory procedures concerning  
retention and availability of evidence, the  
constitutional principles mentioned in  
United States v. Bagley, 473 U.S. 667, 2005  
S.Ct. 1112 (1995), and United States v.  
Dunn, 442 U.S. 470, 1979 U.S. L.W. 3801, 45  
U.S.W.2d 1000, 1001 (1959), are violated. The  
Michigan Court of Criminal Appeals stated  
further controlling concepts in determining  
Dunn's case. The court said that the  
further evidence obtained, the more the  
evidence is more probable. The court  
stated that the evidence is more probable  
only because the State failed to  
obtain evidence and that is a violation.  
So that the evidence can be used in the

termine guilt or innocence, Cano was entitled to rely on established preservation and production practice.

The destroyed and unavailable evidence was essential to Cano's claim of innocence. Had the law enforcement officers retained the seized cocaine, the evidence would have demonstrated that Cano never handled or left fingerprints on the cocaine. Retention of the cocaine itself would have permitted Cano to demonstrate to the jury the percentage of substance that was actually cocaine, thus tending to negate the State's trafficking charge.

The unavailable tape recording would have demonstrated that Cano's trial testimony was absolutely correct, that he was a mere courier, had no specific knowledge that he was carrying two kilograms of cocaine, and never negotiated the cocaine tran-

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he was carrying two kilograms of cocaine,  
and never negotiated the cocaine trans-

saction. Of course, all the jury had, without the tape recording, was what the State argued as Cano's self-serving testimony. The tape recording not only would have corroborated Cano's testimony, but would have demonstrated that the testifying law enforcement officers were at least incorrect or more likely attempting to mislead the jury.

This Court has held that the customary practice of law enforcement officers in failing to preserve evidence for retesting by the defense does not constitute a denial of due process of law. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984). That decision does not constitute a bar to Cano's present claim, because in this case the clear law enforcement practice, which was violated by the police, was to retain contraband and other evidence. The State

action. Of course, all the jury had, without the tape recording, was what the State argued as Cano's self-serving testimony. The tape recording not only would have corroborated Cano's testimony, but would have demonstrated that the testifying law enforcement officers were at least suspected of more likely attempting to mislead the jury.

This Court has held that the customary practice of law enforcement officers in failing to preserve evidence for testing by the defense does not constitute a denial of due process of law. California v. Tigner, 457 U.S. 339, 105 S.Ct. 2326 (1982). That decision does not constitute a bar to Gove's present claim, because in this case the clear law enforcement practice, which was violated by the police, was to retain confidential and other witnesses. The State

had thus established systematic procedures to preserve the captured evidence, unlike the facts in Trombetta, where there was no such preservation procedure and the failure to preserve breath samples was in accord with standard practice. In Cano's case, the destroyed and unavailable evidence possessed "an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendants would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489, 104 S.Ct. at 2534.

In summary as to this point, the Alabama Court of Criminal Appeals has placed a new gloss on the Due Process Clause of the Fourteenth Amendment, by allowing law enforcement officers to intentionally destroy or render unavailable evidence which is favorable to the defendant and which internal

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to preserve the existing evidence, while  
the facts in *Ex parte* there were no  
such preservation procedures and the failure  
to preserve such evidence was in accord  
with standard practice. In *Cano's* case, the  
destroyed and unavailable evidence possessed  
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other reasonably available means." 467 U.S.  
at 467, 104 S.Ct. 2131.

In summary, at this point, the Air-  
Base Court of Criminal Appeals has placed  
a new gloss on the due process clause of the  
fourteenth amendment, by allowing the govern-  
ment officials to intentionally destroy or  
render unavailable evidence which is relev-  
ant to the defendant and which material



police rules require be made available to the defense. Where the destroyed and unavailable evidence is essential to the defense case, and has been shown to have exculpatory value, the prosecution's failure to comply with a specific defense demand for that evidence constitutes a denial of due process.

Petitioner requests that this Court review the decision of the lower tribunal because of the important issue raised. This certiorari petition presents a critical opportunity for this Court to restore the constitutional principle of fundamental fairness to the criminal justice system. So that the concerns of the Framers of our Constitution are served, this Court must issue its writ of certiorari to correct the manifest injustice and error found herein.

police often require the same evidence to  
the defense. Where the destroyed and un-  
available evidence is essential to the  
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exoneratory value, the prosecution's failure  
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so that the substance of the rights of our  
Constitution are served. This Court must  
have the right of petitioner to correct the  
existing injustices and restore fundamental

II. THE DEFENDANT WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE PROSECUTOR WAS PERMITTED TO REFER TO THE DEFENDANT'S ILLEGAL ALIEN-AGE AND SUGGEST THAT THE DEFENDANT'S FAMILY WAS INVOLVED IN DRUG TRAFFICKING.

Alvin Cano was on trial for a single act of trafficking in cocaine, which occurred in January of 1981. During the trial, the prosecution was permitted to adduce evidence that Cano was an illegal alien, that his family was involved in cocaine trafficking in Colombia, and that Cano was a fugitive from justice. This evidence had no relevance to the charge for which Cano was on trial, other than to establish his bad character and propensity for committing criminal activity. The introduction of this collateral conduct was irrelevant to the case and unduly prejudicial to Cano's ability to mount a meaningful defense to the crime charged. It cannot be

II. THE DEFENDANT WAS DEPRIVED OF  
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TRAFFICKING.

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alien, that his family was involved in  
cocaine trafficking in Colorado, and that  
Cane was a fugitive from justice. This  
evidence had no relevance to the crime for  
which Cane was on trial, other than to  
establish his bad character and propensity  
for committing criminal activity. The  
introduction of this collateral evidence was  
prejudicial to the case and unduly con-  
fused the jury to such a significant  
degree that the crime charged. It cannot be

doubted that Cano was convicted by the Alabama trial court jury because he was Colombian. Not only is that an inappropriate basis upon which a criminal conviction can be sustained, it is contrary to principles of fundamental fairness and due process.

No criminal defendant, whether a United States citizen or a foreign national, can be convicted of a crime for which the defendant is not on trial or which is not supported by competent evidence. See Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171 (1959). Where the prosecution is permitted to inflame the passions of the jury by referring to extraneous conduct, which is designed to show the jury that the defendant is a "bad man," the trial is inherently unfair. The use of this challenged evidence to prove Cano's criminal



propensity ran afoul of Justice Harlan's remarks in Boyd v. United States, 142 U.S. 450, 458, 12 S.Ct. 292, 295 (1892):

However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Although Cano asked for no more protection than that, the prosecution was permitted to play fast and loose with his constitutional rights. The prosecution should have been held to its burden of proving Cano's guilt of the crime charged. Instead the prosecution was permitted to convict Cano by assailing his character and by demonstrating his alleged propensity to commit bad acts, conduct which Cano contested. The appellate court concluded that admission of this evidence was not error, because certain portions were not objected

Department of Justice  
Washington, D.C.  
February 1, 1954

Enclosed for the  
Department of Justice  
is a copy of the  
report of the  
Attorney General  
dated February 1, 1954.

Very truly yours,  
[Signature]  
[Title]  
[Address]  
[City, State, Zip]  
[Phone Number]  
[Telex Number]  
[Fax Number]  
[Email Address]  
[Web Address]  
[Social Media Links]  
[Other Contact Information]



to and other portions were not harmful. In so ruling, the appellate court overlooked defense counsel's objection to the illegal alienage line of questions, which certainly preserved the issue for appellate review. Regarding the harmfulness issue, the lower tribunal failed to apply the harmless beyond all reasonable doubt standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).

Petitioner submits that this court must review this due process issue within the context of the harmless error standard utilized by the Alabama Court of Criminal Appeals. Erroneous application of the constitutional harmless error standard by the lower tribunal essentially rejected any claim of constitutional error, and suggests that an error can be deemed harmless even when there is no determination that it is

to and other positions were not helpful. In  
the ruling, the appellate court overruled  
the lower court's objection to the illegal  
alliance line of questions, which certainly  
preserved the issue for appellate review.  
Regarding the hardship issue, the lower  
court failed to apply the hardship beyond  
all respondents being awarded of \$100,000.

California, 1984 S.W. 2d 422, 424

(1984)

For direct review of this court's  
review this due process issue within the  
context of the hardship issue. The  
ruling by the Appellate Court of Criminal  
Justice. The Appellate Court of the  
California Court of Criminal Justice  
the lower court's ruling was reversed and  
the issue of hardship was remanded to the  
lower court for further review. The  
lower court was to conduct further review  
and to determine if the hardship issue was  
to be resolved.

harmless beyond all reasonable doubt. State appellate courts should not be permitted to apply constitutional principles in a manner which causes disharmony with controlling Supreme Court precedent. Because Petitioner was denied his constitutional right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and the appellate court completely disregarded that position, this court should accept this case for certiorari review and correct the injustice found herein.

III. A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO HAVE THE JURY INSTRUCTED ON LESSER INCLUDED OFFENSES.

Cano was charged with one of the most serious violations of Alabama law: trafficking in more than 400 grams of cocaine. This offense, upon conviction, requires a mandatory minimum sentence of 15 years imprisonment. Notwithstanding the defense

business beyond all reasonable doubt. State  
appellate courts should not be permitted to  
apply constitutional principles in a manner  
which causes dissension with controlling  
Supreme Court precedent. Because Petitioner  
was denied his constitutional right to due  
process, as guaranteed by the Fourteenth  
Amendment to the United States Constitution,  
and the appellate court arbitrarily disre-  
garded this position, this court should  
accept this case for certiorari review and

reverse the appellate court decision.

IT IS REQUESTED THAT A WRIT OF HABEAS CORPUS  
BE GRANTED TO REVOKE THE JUDICIAL  
DECISION OF THE APPELLATE COURT AND  
REVERSE THE DECISION OF THE APPELLATE COURT.

Very truly yours,  
[Signature]  
[Name]  
[Address]  
[City]  
[State]  
[Zip]

request that the jury be instructed on the lesser included offense of possession of cocaine, an offense which carries a much less severe penalty, the trial court declined to so instruct the jury. The jury thus had but one offense upon which to deliberate Cano's fate: guilty or not guilty of trafficking. The appellate court affirmed Cano's trafficking conviction, finding that "there was no rational basis for a charge on the lesser included offense of possession of cocaine." By so ruling, the Alabama Appellate Court deprived Cano of due process by limiting his right to have the jury instructed on all applicable points of law.

Under Alabama law, the offense of trafficking in cocaine includes the lesser included offense of possession. Ex parte Kerr, 474 So.2d 145 (Ala. 1985). While that

request that the jury be instructed on the  
issues involved in the possession of  
property. An officer who carried a gun  
last night, the jury could be  
instructed to be instructed the jury. The jury  
then had one officer upon which to  
believe that the jury's duty is to  
of the jury. The officer could be  
instructed that the jury's duty is to  
the jury. There was no evidence that the  
a charge on the issue of possession of  
possession of property. By so doing, the  
officer could be instructed that the  
process of the jury is to have the  
jury instructed on all evidence that is  
the

There is no evidence that the officer of  
possession of property. The officer could be  
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a charge on the issue of possession of  
possession of property. By so doing, the  
officer could be instructed that the  
process of the jury is to have the  
jury instructed on all evidence that is  
the

legal point is abundantly clear, the lower tribunal concluded that a lesser included instruction was unavailable to Cano because he admitted to possessing the small amount and the larger amount of cocaine. This is an inaccurate and inappropriate conclusion, since the trial record reflects that while Cano handled two separate quantities of cocaine, it was only his possession of the small seven gram sample which was knowingly and intentionally entered into. It should have been for the jury to determine whether Cano merely knowingly possessed the sample, or whether Cano knowingly trafficked in the nearly two kilograms of cocaine.

Due process requires that a defendant in a criminal case receive instructions on lesser included offenses. See Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390 (1980) (lesser included offense ins-





tructions in capital cases is a matter of federal constitutional law); Rembert v. Dugger, 842 F.2d 301, 303 (11th Cir. 1988). While this rule is plain in capital cases, this Court explicitly left open the question of whether due process required lesser included instructions in non-capital cases. 447 U.S. at 638 n. 14, 100 S.Ct. at 2390 n. 14. Subsequent cases from the Court defining Beck have not addressed the question. See, e.g., Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154 (1984); Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049 (1982).

The instant case is the ideal vehicle for resolving the open question of whether due process requires lesser included instructions in non-capital cases. There is no doubt that under Alabama law, the offense of possession of cocaine is a lesser included offense of trafficking in cocaine.



Kerr, supra. Yet, the Alabama courts failed to adhere to controlling law when Cano was denied the opportunity to have the jury consider his guilt in the context of the charged offense and the lesser included offense. Since the facts are such that a jury could have found that Cano merely possessed the smaller quantity of cocaine as opposed to having trafficked in the larger amount of cocaine, Cano was denied his due process protections. Only this Court can resolve this question by accepting this case for certiorari review.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE REFUSED TO TREAT HIM IN THE SAME MANNER FOR PLEA AND SENTENCING PURPOSES AS HIS MORE CULPABLE CODEFENDANT, AND WHEN THE COURT IMPOSED A DISPROPORTIONATE SENTENCE.

In this case, when the prosecuting attorney refused to allow Petitioner to enter a plea to the same reduced charge as

WELL KNOWN. But, the Alabama courts failed to observe the controlling law when they denied the opportunity to have the jury consider his guilt in the absence of the charged offense and the lesser included offense. Since the facts are such that a jury could well find that the accused possessed the specific quantity of cocaine as charged in the indictment in the former count of the indictment, then the denial of the jury's right to consider this count is a denial of the right to a fair trial.

IV. PETITIONER HAS DENIED THE PROSECUTION OF LAW AND EVIDENTIAL BELIEFS THAT THE STATE WOULD TO TRIAL HIM IN THE SAME MANNER FOR THE SAME OFFENSES. PETITIONER HAS BEEN DENIED A FAIR TRIAL AND A FAIR HEARING.

It is the policy of the Government to allow the jury to consider the evidence in the case and to make a finding of guilt or innocence.

his codefendant, Cano was compelled to go to trial, resulting in his conviction for cocaine trafficking and a 21-year sentence. By contrast, codefendant Farrell had been permitted to plead to a reduced cocaine possession charge and received a 10-year sentence. Farrell was not even required to provide substantial assistance to law enforcement and did not testify at Cano's trial.

The conduct of the prosecution in its double standard treatment of Cano is constitutionally suspect. The resulting sentence imposed on Cano, which more than doubles the incarceration imposed upon the more culpable codefendant, is constitutionally disproportionate, especially since the codefendant received a parolable sentence, and Cano must serve his 21 years without eligibility for parole.



When a claim of disproportionality is raised by a defendant, a court is to consider the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983). It is apparent that the lower tribunal failed to adhere to these criteria, since there is no constitutional way to justify Cano's heavy sentence when contrasted with the sentence imposed upon his more culpable codefendant. Although the gravity of the offense (trafficking in drugs) is harsh, the sentences imposed on similarly situated offenders, like Farrell, are minimal by comparison. Additionally, 21-year terms of imprisonment are not routine for possession of 2 kilograms of cocaine.





It appears that the only basis for a sentence this harsh is to speculate that Cano was penalized for going to trial. In that case, there can be little doubt that Cano's treatment and sentence is unquestionably unconstitutional. See United States v. Underwood, 588 F.2d 1073, 1078 (5th Cir. 1979). In order to remedy this unconstitutional and disproportionate treatment among similarly situated offenders, this Court should accept this case for certiorari review. This case will provide this Court with a vehicle to evaluate claims by state criminal defendants that they were mistreated at the hands of the prosecution and the court by being subjected to different treatment than their codefendants for no valid reason.



**CONCLUSION**

For the reasons stated, this Court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

**BENEDICT P. KUEHNE  
SONNETT SALE & KUEHNE, P.A.  
One Biscayne Tower, #2600  
Two South Biscayne Blvd.  
Miami, Florida 33131-1802  
Telephone: 305/358-2000  
Counsel for Petitioner**



**APPENDIX**



THE STATE OF ALABAMA **CONTENTS OF APPENDIX** DEPARTMENT

**Cano v. State, 543 So.2d 724**  
**(Ala.Crim.App. 1989)**

OCTOBER TERM, 1988-89

2 NOV. 1989

ALABAMA SUPREME COURT

W.

1989

Appellate Court Session with 1989

THIRD, FOUR

Direct Appeal from the Alabama Court of Criminal Appeals

Case No. 88-00000, 1989 ALA. 1989-00000

Case No. 88-00000, 1989 ALA. 1989-00000

Case No. 88-00000, 1989 ALA. 1989-00000

Case No. 88-00000, 1989 ALA. 1989-00000

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Case No. 88-00000, 1989 ALA. 1989-00000

Case No. 88-00000, 1989 ALA. 1989-00000

Case No. 88-00000, 1989 ALA. 1989-00000

CONTENTS OF VOLUME

THE HISTORY OF THE  
CITY OF NEW YORK



**THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT**

**THE ALABAMA COURT OF CRIMINAL APPEALS**

**OCTOBER TERM, 1988-89**

**4 Div. 964**

**ALBERT ALVIN CANO**

**v.**

**STATE**

**Appeal from Houston Circuit Court**

**TYSON, JUDGE**

Albert Alvin Cano was indicted for trafficking in cocaine in violation of §20-2-80, Code of Alabama 1975. The jury found the appellant "guilty as charged in the indictment." The appellant was sentenced to 21 years imprisonment with a 15-year minimum mandatory sentence and fined \$250,000.

James G. Ward, an investigator with the narcotics unit of the Alabama Bureau of

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

THE REPORT, MADE BY THE JUDICIAL DEPARTMENT

FOR THE YEAR 1890

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Investigation, testified that he was involved in undercover narcotics operations in Dothan, Alabama, in December of 1980 and January of 1981. On December 30, 1980, Ward received information from an informant, Will Johns, that he was to meet James Talmadge Farrell on January 2, 1981 at the Ramada Inn in Dothan. On that day at approximately 12:40 p.m., Investigator Bill Rhegness and Johns went to Room 160 at the Ramada Inn and met with Farrell and Mauricio Noguera.

Several officers with local law enforcement agencies were in Room 161 monitoring the conversations in Room 160. Ward told Farrell he wanted to purchase four kilos of cocaine and a price of \$220,000 was agreed upon. Ward showed Farrell and Noguera \$50,000 and told them the rest of the money was in another room and it would be delivered when the deal was completed.

Investigation, testified that he was the  
voiced in numerous previous operations  
in Boston, Alaska, in December of 1940 and  
January of 1941. On December 18, 1940, 1941  
testified information from an informant, that  
there, that he was to meet these persons  
Vernon on January 2, 1941 at the Nevada Inn  
in Boston. On that day at approximately  
11:45 a.m., Investigator Bill Higgins and  
others went to room 141 at the Nevada Inn and  
met with Farrell and Kenneth Higgins.  
Several persons were found in the adjacent  
room across the hall in room 142. Following  
the investigation in room 142, Higgins  
testified he searched the room and found a box of  
cigarettes and a box of 25.00 and was taken  
away. There showed Higgins and Higgins  
450.00 and told him the rest of the money  
was in another room and he would be  
lived with the mail and telephone

Farrell and Noguera told Ward and Rhegness that they had to go to Tallahassee, Florida to pick up the drugs and they would return as soon as possible.

At 5:10 p.m., Farrell returned to Room 160 accompanied by the appellant. Noguera was not with them. The appellant produced a plastic bag with approximately seven grams of a white powdery substance. Rhegness tested the substance and the test was positive for cocaine. The appellant stated he had brought the cocaine from Miami, Florida, but that he only had two kilos. A price of \$110,000 was negotiated for the two kilos of cocaine. The appellant then asked Ward or Rhegness to accompany him to his car to get the rest of the cocaine. When Ward replied that he and Rhegness were not leaving, the appellant left the room and returned with a shopping bag. The appellant

Barrett and Rogers said word and happened  
that they had to go to Tallahassee, Florida  
to take the boys and they would return  
as soon as possible.

At 8:10 p.m., Barrett returned to Room  
100 accompanied by the applicant. Rogers  
was not with them. The applicant purchased  
a piece of red with approximately a grey stripe  
of a white polyester-cotton blend. Rogers  
tested the substance and the test was  
positive for cocaine. The applicant stated  
he had brought 100 pounds from Miami,  
Florida, but that he only had the actual  
a piece of this and was supposed for the  
rest of it. The applicant then  
went over to the room to show him the  
the one to get the rest of the cocaine.  
Rogers said that he and Barrett were  
not leaving, the applicant left the room and  
returned with a shopping bag. The applicant

dumped two kilos of cocaine from the shopping bag onto the bed. One of the kilos was checked for cocaine by Rhegness and the test was positive. Farrell and the appellant were then placed under arrest. Noguera was arrested at a phone booth in front of the Ramada Inn.

Joseph Saloom, a criminalist with the Department of Forensic Sciences, testified that he received three bags containing a white substance from Rhegness. This substance was determined to be cocaine. The total weight of the cocaine was 4.37 pounds or 1984.76 grams.

The appellant testified that he was living in Miami, Florida in December of 1980. On Christmas Even, he met Noguera for the first time at a party. The appellant understood Noguera was a student living in Tallahassee.

changed two sides of curtains from the shop-  
ping bag onto the bed. One of the sides was  
checked for needles by Thompson and the case  
was positive. Later, and the appellant  
were then placed under arrest. Thompson was  
arrested as a phone booth in front of the  
house.

Thompson, being a criminalist with the  
Department of Forensic Medicine, testified  
that he received three bags containing a  
white substance from Thompson. This sub-  
stance was believed to be cocaine. The  
total weight of the substance was 4.75 grams  
or less.

The appellant testified that he was  
living in Miami, Florida in December of  
1960. He testified that he had worked for  
the time of a year. The appellant  
indicated that he was a student living in  
Miami.



On January 1, 1981, the appellant's brother, whom the appellant knew was a drug dealer, asked the appellant to drive a rented car containing cocaine to Tallahassee to meet Noguera. The appellant was to receive \$1,500 for the trip.

On January 2, 1981, the appellant left Miami and arrived in Tallahassee at around 4:00 p.m. When the appellant arrived at Noguera's apartment, Noguera made a phone call. Farrell came to the apartment a few minutes later. Noguera told the appellant they had to go somewhere and for him to come along. The appellant rode with Farrell in his car and Noguera followed in the rented car. Once they arrived at the Ramada Inn in Dothan, Noguera told him to go with Farrell and show a sample of the cocaine to Ward and Rhegness.

On January 1, 1981, the appellant's brother, who the appellant knew was a drug dealer, asked the appellant to drive a rented car containing cocaine to Tallahassee to meet Webster. The appellant did so

on January 2, 1981, for the trip.

On January 3, 1981, the appellant left Miami and arrived in Tallahassee at around 6:00 p.m. when the appellant arrived at Webster's apartment, Webster made a phone call. Webster's name to the appellant was a few minutes later. Webster told the appellant they had to go somewhere and for him to drive along. The appellant rode with Webster in his car and Webster followed in the rented car. When they arrived at the meeting location, Webster, Webster told him to go with Webster and show a sample of the cocaine to Web and Webster.

The appellant broke open a package of the cocaine that he had brought and removed seven grams. When the appellant showed Ward the seven grams of cocaine, Ward started asking about four kilos of cocaine. The appellant replied that he was tired and that he only had two kilos. When Ward agreed to accept the two kilos, the appellant went outside to get the bag which contained the rest of the cocaine and gave it to Ward and Rhegness. The appellant was to receive \$100,000 for the cocaine from Farrell to give to his brother in Miami, Florida.

I  
(A)

The appellant contends his case should have been dismissed by the trial court because the cocaine was destroyed prior to trial without his knowledge or consent.

At trial, Investigator Ward testified that he received a card from Joseph Saloom

The appellant broke open a package of the cocaine that he had bought and received seven grams. When the appellant showed him the seven grams of cocaine, he started asking about four kilos of cocaine. The appellant replied that he was tired and that he only had two kilos. When he started to escape the two kilos, the appellant went outside to get the bag which contained the rest of the cocaine and gave it to him and returned. The appellant gave to him the cocaine that he had given to him in the past in Miami, Florida.

2  
(A)

The appellant continued his work until he was released by the trial court because the cocaine was destroyed prior to trial without his knowledge or consent. He later learned that the cocaine was destroyed and that he received a right to return the cocaine.

asking if the cocaine in this case should be maintained or destroyed. Ward replied to Saloom that it should be destroyed. Ward testified that the street value of this cocaine was \$1,000,000.

Saloom testified that the cocaine was destroyed in 1982 after he received permission from Ward. He stated that the policy of the Department of Forensic Sciences was to maintain evidence for a period of two years unless otherwise indicated. The jury heard this evidence.

In arguing his motion to dismiss prior to trial, defense counsel stated he asked the district attorney for the cocaine in the summer of 1987, a few months prior to trial. At this time, defense counsel was informed that the cocaine had been destroyed. Defense counsel indicated he wanted

asking if the cocaine in this case should  
be retained or destroyed. Ward testified  
to Nelson that it should be destroyed. Ward  
testified that the street value of this  
cocaine was \$1,000,000.

Nelson testified that the cocaine was  
destroyed in 1973 after he received further  
advice from Ward. He stated that the policy  
of the Department of Narcotics Enforcement was  
to destroy evidence for a period of two  
years unless otherwise indicated. The jury  
heard this evidence.

In arguing his motion to dismiss twice  
in total, Nelson argued that he acted  
in reliance on the advice of the police in  
the destruction of the cocaine in  
the month of 1973, a few months prior to  
trial. At this time, Nelson argued that  
he acted in reliance on the advice of the police  
and that the cocaine was destroyed  
before the trial. Nelson testified that he acted

the cocaine so that he could weigh it and test it for the presence of cocaine.

"The Due Process Clause of the fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in Trombetta, *supra*, 467 U.S., at 486, 104 S.Ct., at 2532, that '[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.' Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, see Lisenba v. California,





314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

The appellant contends that Investigator Ward's intentional destruction of the cocaine, within the two-year time period that DFS usually maintains evidence, was an



indication of a bad faith motive by Ward. We disagree.

It appears from the record that the cocaine was destroyed due to its \$1,000,000 street value. This court is of the opinion that this was a valid reason for the destruction of the cocaine and we can find no evidence of any bad faith motive on the part of the police or the prosecution in this case involving the destruction of the cocaine at issue.

Moreover, the record indicates that the appellant jumped bail and fled the State shortly after his arrest in 1981 and he was not returned to this State until 1987. The cocaine was destroyed during the time when the police did not know where to locate the appellant. Although trial counsel represented the appellant in 1981, he did not

indication of a bad faith motive by him.

We disagree.

It appears from the record that the cocaine was destroyed after the \$1,000 and street value. That figure is of no significance that there was a valid reason for the destruction of the cocaine and we can find no evidence of any bad faith motive on the part of the police in the destruction in this case involving the destruction of the cocaine and value.

Moreover, the record indicates that the appellant himself said that the State actually seized the cocaine in 1951 and he was not returned to the State until 1952. The cocaine was destroyed during the time when the police did not have access to the cocaine. Although it is a fact that the appellant was not returned to the State until 1952, it is not

request a sample of the cocaine until he contacted the district attorney in 1987.

Even if the cocaine had been maintained for a two-year period according to DFS procedure, the cocaine would have been routinely destroyed long before the 1987 date of his motion.

Furthermore, we note that the chances are very slim that the cocaine in this case was exculpatory to the appellant, particularly in light of his testimony at trial. The appellant admitted the substance he gave to Ward and Rhegness was cocaine and he referred to the amount of the cocaine as two kilos. There was also evidence that Rhegness tested the substance in the Ramada Inn room and it tested positive for cocaine.

Thus, we find the trial court correctly denied the appellant's motion to dismiss.

(B)

received a copy of the document which he  
contacted the District Attorney in 1957.

Even if the document had been maintained  
for a two-year period according to the  
provisions, the document would have been  
continually destroyed long before the 1957  
date of the action.

Furthermore, we note that the document was  
very well kept and the document in this case was  
maintained on the appellant's premises.  
In light of the fact that the document was  
apparently retained the document is not to  
be destroyed and the document was not  
destroyed in the course of the document in the  
course of the document in the course of the  
document. There was also evidence that the  
document was destroyed in the course of the  
document and it would be very difficult to  
find, as is the case with the document.  
During the appellant's trial in 1957.

The appellant also contends that Ward's and Rhegness's testimonies concerning their conversation with the appellant in the motel room should not have been admitted into evidence because a tape recording of that conversation had been lost prior to trial. The appellant claims that the unavailability of the tape recording violates the principles set out in Brady v. Maryland, 373 U.S. 83, 87 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

"Essential to a claim under Brady is a showing that (1) the government suppressed or withheld requested evidence that was both (2) favorable and (3) material to the defense. Moore v. Illinois, 408 U.S. 786, 794-95 S.Ct. 2562, 2568-69, 33 L.Ed.2d 706 (1972). United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984).

"...





"[T]he standard of materiality is whether the suppressed evidence might have affected the outcome of the trial. [United States v. Agurs, 427 U.S. [97] at 104-06 [96 S.Ct. 2392 at 2397-98, 49 L.Ed.2d 342 (1976)]; United States v. Blasco, 702 F.2d 1315, 1327 (11th Cir. 1983).'  
Walker, supra at 1535. (Footnote omitted.)"

Crawford v. State, 485 So.2d 391, 396 (Al. Cr. App. 1986).

At trial, the appellant, as well as Ward and Rhegness, was allowed to testify about the conversation which took place in the motel room. There were very few differences between the investigators' versions of the conversation and the appellant's version and such differences were insignificant. The jury was able to hear all of this evidence, and thus, we find that the loss of the tape recording did not affect the out-

"Type standard of  
reliability is whether the  
suppressed evidence might  
have affected the outcome  
of the trial. United  
States v. J. Edgar, 357 U.S.  
105, 104-90 (S. Ct.  
1957) at 107-92, 44 L. Ed. 2d  
102 (1957); United States  
v. Jackson, 392 U.S. 198,  
1997 (S. Ct. 1968).  
United States v. Jackson,  
1968-2 CB 215.

United States v. Jackson, 392 U.S. 198, 1997 (S. Ct. 1968).

(S. Ct. 1968).

At trial, the applicant, as well as the  
and Jackson, was allowed to testify about  
the conversation which took place in the  
and there. There were very few differences  
between the applicant's version of the  
conversation and the applicant's version  
and such differences were insignificant.  
The fact was that the fact of this con-  
versation, and that the fact that the fact of  
the conversation did not affect the out-

come of this appellant's trial. See Crawford.

Furthermore, these tapes were lost during the six year period when the appellant had voluntarily absented himself from this State. He was responsible for the length of time between his arrest and trial, during which these tapes were lost.

## II

The appellant contends the trial court erred by denying his oral request for an instruction to the jury on possession of cocaine as a lesser included offense. In Ex parte Kerr, 474 So.2d 145 (Ala. 1985), the Alabama Supreme Court held that,

"Conduct proscribed by §20-2-70 [possession] is clearly a lesser offense included in the criminal conduct addressed in §20-2-80 [trafficking]; and a jury instruction to that effect is required, where requested, if any reasonable theory of the evidence

case of this appellant's trial. See Case-

1944

Furthermore, these facts were lost during  
the six year period when the appellant had  
voluntarily absented himself from this  
State. He was responsible for the length  
of time between his arrest and trial, during  
which these facts were lost.

## II

The appellant testified that he had been  
arrested by Kentucky State Police for an  
instruction to the jury on possession of  
cocaine in a house located at 1000  
N. Main Street, Louisville, Kentucky, 1944.  
The witness agrees that this was

\*Contact provided by  
100-100 (Investigation) in  
1944, a house located  
located in the vicinity  
of 1000 N. Main Street, Louisville,  
Kentucky, and a jury  
instruction to the jury on  
possession of cocaine in  
a house, which was  
given to the jury.

supports a finding of the lesser offense."

Kerr, 474 So.2d at 147.

In Kerr, the defendant was stopped in his car by a police officer. The officer found an open pouch of marijuana on the front seat next to the defendant. The officer also found a large quantity of marijuana in a duffel bag in the trunk of the defendant's car. The defendant in Kerr admitted possession of the marijuana found on the front seat (the quantity of which was less than the amount required for trafficking) but denied any knowledge of the marijuana found in the trunk (the quantity of which was greater than the amount required for trafficking).

The Supreme Court held that a charge on the lesser included offense of possession of marijuana should have been given in Kerr because

suggests a finding of the  
lower court.

Page 475 to 476.

In fact, the defendant was stopped in his  
car by a police officer. The officer found  
an open bottle of whiskey in the front seat  
next to the defendant. The officer also  
found a large quantity of whiskey in a  
dotted bag in the trunk of the defendant's  
car. The defendant in fact admitted pos-  
session of the whiskey found in the trunk  
and the quantity of which was less than  
the amount claimed in the indictment. The  
defendant also admitted the whiskey found  
in the trunk was quantity of which was  
greater than the amount required for the  
indictment.

The evidence does not show a charge of  
the same kind of whiskey of possession  
of whiskey which was found in the

indictment

"... [i]f the instant jury had believed the accused's defense theory - that he possessed the quantity of marijuana found beside him on the car seat and that he had no knowledge of the contents of the duffel bag in the trunk - it would have been justified in returning a verdict of guilty pursuant to §20-2-70. Here, the evidence would support a finding under either §20-2-70 or §20-2-80."

Kerr, 474 So.2d at 146.

The facts of this case are easily distinguished from those in Kerr. In Kerr, the defendant admitted possession of the small quantity of marijuana but denied knowledge of the larger quantity. Here, the appellant admitted he possessed and delivered both the small quantity of cocaine (the seven gram sample) and the larger quantity of cocaine (the two kilos).

The appellant seems to argue that an instruction on possession of cocaine should

"... [1] the instant  
jury had believed the ac-  
cused's defense theory -  
that he possessed the gun-  
city of Harrison found  
beside him on the car seat  
and that he had no knowledge  
of the contents of the  
hotel bag in the trunk -  
it would have been justified  
in returning a verdict of  
guilty pursuant to 10-1-  
10. Here, the evidence  
would support a finding  
under either 10-1-10 or  
10-1-10."

EXH. 10-1-10 at 140.

The facts of this case are well known.  
Gordon took place in 1961. In 1961, the  
defendant admitted possession of the small  
quantity of marijuana and denied knowledge  
of the larger quantity. Here, the defendant  
admitted he possessed and delivered both the  
small quantity of cocaine (the seven gram  
baggie) and the larger quantity of cocaine  
(the two kilos).

The defendant seems to agree that in  
relation to possession of cocaine would



have been given because he did not intend to "traffick" in the two kilos of cocaine. He asserts that he was merely delivering the cocaine for Noguera due to a "last minute request." This argument is meritless.

"Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine... is guilty of... 'trafficking in cocaine.'" Ala. Code §20-2-80(2) (1975).

The appellant admitted being in actual possession of the seven gram sample of cocaine and the two kilos (more than 1900 grams) of cocaine. There is absolutely no evidence to the contrary.

"A defendant who is accused of the greater offense is entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable

have been given because he did not intend  
to "testify" in the two trials of cocaine.  
He asserts that he was merely delivering the  
cocaine for someone else to a "last minute  
request." This argument is unavailing.

"Any person who knowingly sells, man-  
ufactures, delivers, or brings into this  
state, or who is knowingly in actual or  
constructive possession of, 15 grams or more  
of cocaine... is guilty of..." (testimony)  
in cocaine." Ala. Code 13A-6-2(1) (1977).

The defendant admitted being in actual  
possession of the seven grams of cocaine  
found in the two trials (see also the  
grams) of cocaine. There is absolutely no  
evidence in the evidence.

"A defendant who is accused of the crime  
of cocaine is entitled to have the state  
prove the intent element beyond a  
reasonable doubt. If there is any reasonable

theory from the evidence, which would support the position." Kerr, 474 So.2d at 146 (quoting Fulgham v. State, 291 Ala. 71, 277 So.2d 886 (1973)).

There is no evidence in the record that the appellant knowingly possessed the smaller quantity of cocaine but not the larger amount. Thus, there was no rational basis for a charge on the lesser included offense of possession of cocaine. The trial judge correctly denied the request for this charge.

### III

The appellant contends reversible error occurred in this case because "the prosecution was permitted to adduce evidence that Cano was an illegal alien (R. 255-256), that his family was involved in cocaine trafficking in Columbia (R. 293) and that he was

theory from the evidence, which would support the position." *Id.*, 474 So.2d at 126 (quoting *United States v. Davis*, 391 A.2d 127, 127 So.2d 126 (1973)).

There is no evidence in the record that the appellant knowingly possessed the smaller quantity of cocaine but not the larger amount. Thus, there was no rational basis for a charge on the lesser included offense of possession of cocaine. The trial judge correctly denied the request for this

charge.

101

The appellant contends reversible error occurred in this case because the prosecution was permitted to adduce evidence that Cano was an illegal alien (E. 105-115), that his family was involved in cocaine trafficking in Colombia (E. 105) and that he was

a fugitive from justice." Appellant's brief, p. 16.

During the prosecutor's cross-examination of the appellant, the following occurred:

"Q Mr. Cano, how long were you in Miami?

"A When was that?

"Q From the time -- from January 1, 1981, going back.

"A Well, I arrived in that particular year -- I arrived more or less in September, 19 -- August, September, 1980.

"Q Were you admitted to the country legally at that time, Mr. Cano? You were not, were you?

"A Well, if you let me explain.

"Q No, sir, just answer my questions.

"MR. SALTER: Objection, may it please the Court. This goes to other matters indicating other criminal conduct not charged in the indictment. I think the defendant ought to be allowed to explain because being in this country legally and illegally is --

"THE COURT: Allow him to explain, Mr. Valéska." (R. 255-56).

This court can only review matters on which rulings have been invoked at the trial

a "Fugitive from Justice" Appellate's

brief, p. 12.

During the prosecutor's cross-examination

the appellant, the following occurred:

"Q. Mr. Cann, how long were you in

prison?

"A. When was that?

"Q. From the time -- from January 1,

1931, going back.

"A. Well, I arrived in that particular

year -- I arrived some or time in

September, 19 -- August, September,

1930.

"Q. Were you admitted to the county

prison at that time, Mr. Cann? You

were not, were you?

"A. Well, it was not an explanation.

"Q. No, sir, just answer my questions.

"A. Well, I was not in prison.

It seems the Court, this

year to other matters I

was not charged in the

indictment. I think the

indictment counts to be

based on certain persons

being in this country legal.

It was illegally in --

"THE COURT: Will you

explain, Mr. Cann, is

that --

This court can only review matters on

which rulings have been made at the trial

court level. Moore v. State, 457 So.2d 981 (Ala. Cr. App. 1984).

Here, the appellant did not receive or ask for an adverse ruling. In fact, the trial judge did precisely what defense counsel asked - i.e., he allowed the appellant to explain his answer. Furthermore, evidence of this same character was admitted without objection at other points in the trial. (See R. 99, 289, 304.).

The following portion of the transcript also occurred during the cross-examination of the appellant.

"Q What happened to Cesar?

"A Cesar die in 1985.

"Q Killed in Columbia; right?

"A Correct.

"Q Over drugs, right? In a drug war, did you not testify to that earlier, Mr. Cano?

"A Well, I didn't say that it was a drug war.

"Q Did you say it was over drugs, Mr. Cano?

"A It was not really over drugs. It was that somebody stole something from him and they just killed him." (R. 290-91).





Defense counsel did not object to the prosecutor's question, and, thus, this issue is not preserved for our review. Bell v. State, 466 So.2d 167 (Ala. Cr. App. 1985).

Furthermore, we fail to see how the appellant was harmed by the prosecutor's question because the appellant had already admitted that his brother was a drug dealer (R. 271), and he replied in the negative to the prosecutor's question.

The appellant's assertion that the trial court erred by admitting evidence that the appellant was a fugitive from justice is not before this court for review. The appellant never objected to the admission of this evidence, and, thus, this issue has not been properly preserved for appellate review. Bell.

Defense counsel did not object to the  
prosecutor's question, and, thus, this issue  
is not preserved for review. *State v. Bell*,  
100 So.2d 101 (Fla. 1st DCA, 1958).  
Furthermore, we fail to see how the  
appellant was harmed by the prosecutor's  
question because the appellant had already  
admitted that his brother was a drug dealer  
(R. 77), and he testified in the negative to  
the prosecutor's question.

The appellant's contention that the trial  
court acted by admitting evidence that the  
appellant was a fugitive from justice is not  
before this court for review. The appellant  
never objected to the admission of this  
evidence and, thus, this issue has not been  
properly preserved for appellate review.

*Bell*

On July 19, 1988, the appellant filed with this court a "Motion for Remand to the Circuit Court for an Evidentiary Hearing." In his motion, the appellant alleged the following:

"2. Appellant submits that a critical issue in this appeal will be the propriety of certain remarks made by the prosecutor during the State's opening and closing arguments.

"3. During arguments, the District Attorney referred to Appellant as a 'merchant of death' and that Appellant was responsible for the 'killing of children.' (Other improper remarks were also made). At least some of these prejudicial comments were objected to by Appellant's counsel. Attached hereto as Exhibit 'A' are the excerpts from the trial transcript reflecting the opening and closing arguments." (Emphasis added.)

On July 19, 1968, the appellant filed with this court a "Motion for Remand to the Circuit Court for an Evidentiary Hearing." In his motion, the appellant alleged the following:

"1. Appellant contends that a critical issue in this appeal will be the propriety of certain evidence introduced by the Government during the State's opening and closing arguments.

"2. During arguments, the District Attorney stated to Appellant as a 'character of health' and that Appellant was 'psychopathic' and 'ill' of the mind. Other improper evidence was also admitted. Appellant contends that evidence introduced by Appellant's counsel, including hearsay evidence, is 'in' the trial transcript reflecting the opening and closing arguments. Appellant contends:

On July 20, 1988, the appellant's motion was denied by this court. On appeal, the appellant urges this court to reconsider its denial of the "Motion to Remand to the Circuit Court for an Evidentiary Hearing." This issue is without merit and it is unnecessary to remand this case for an evidentiary hearing.

Rule 21(b), A.R.Crim.P.Temp. provides that "In all non-capital cases, the court reporter shall take full stenographic notes of the arguments of counsel if directed to do so by the judge." (Emphasis added.) If the judge does not direct the court reporter to take notes of the arguments of counsel, as here, then,

"The official court reporter shall attend in person, except as otherwise herein provided, the sessions of court held in the circuit for which he is appointed, and in every case, where directed by the judge or requested by a



party thereto, he shall take full stenographic notes of the oral testimony and proceeding, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon and exceptions taken or reserved thereto."

Ala. Code, §12-17-275 (1975) (emphasis added).

"The official court reporter is not required to transcribe the argument of counsel except where objection is made. McClary v. State, 291 Ala. 481, 282 So.2d 384 (1973); Langford v. State, 354 So.2d 297 (Ala. Cr. App. 1977), rev'd on other grounds, 354 So.2d 313 (Ala. 1977); Ala. Code §12-17-275 (1975).'  
Ervin v. State, 399 So.2d 894, 898 (Ala. Cr. App. 1981), cert. denied, 399 So.2d 899 (Ala. 1981). Any remarks made by the prosecutor which the appellant considers objectionable should be fully quoted, or substantially so, by objection. Id.

"It is incumbent upon counsel, where he makes objection

party thereto, he shall take  
all necessary steps to  
the oral testimony and  
proceeding, except argument  
of counsel, and note the  
order in which all docu-  
mentary evidence is intro-  
duced, all objections of  
counsel, the rulings of the  
court thereon and exceptions  
taken or reserved thereon.

Also Code, §§ 11-175 (1971) (emphasis  
added).

"The official court  
reporter is not required to  
transcribe the argument of  
counsel except where ap-  
pointed in writing. [McClary  
v. State, 201 Ala. 441, 202  
So.2d 304 (1957); Lanthier  
v. State, 204 So.2d 737  
(Ala. Civ. App. 1967); see also  
on other grounds, 204 So.2d  
717 (Ala. 1967); Ala. Code  
§ 11-17-12 (1957).] [McClary  
v. State, 201 So.2d 441, 202  
Ala. Civ. App. 1967; Lanthier  
v. State, 204 So.2d 737 (Ala.  
Civ. App. 1967).] Any testimony  
the prosecutor wishes to  
exclude, counsel is to  
testimony should be fully  
posed or substantially so  
by objection. [Lanthier  
v. State, 204 So.2d 737 (Ala.  
Civ. App. 1967).]

"It is the  
duty of counsel  
to object to  
any objection



to the closing argument, to specifically state and present to the attention of the trial court by proper objection such argument and the court's ruling thereon in order that the court reporter be able to transcribe same and include this in the record on appeal... Moreover, where, as here, the appellant is not an indigent, it is incumbent upon counsel, if he desires the complete closing argument transcribed, to bring in a court reporter and have same done, or to pay the reporter for transcribing the complete closing argument."

"Briggs v. State, 375 So.2d 530, 535 (Ala. Cr. App. 1979)."



Reeves v. State, 518 So.2d 168, 171 (Ala. Cr. App. 1987).

The few objections made by counsel during argument were fragmentary in nature. The record does not contain any of the comments allegedly made by the prosecutor which the appellant asserts were improper. "It is the duty of counsel urging error in closing [or opening] argument to be certain that the full language, deemed objectionable, is set forth so that the propriety of same is preserved in the record." Ragsdale v. State, 448 So.2d 442 (Ala. Cr. App. 1984) (citations omitted). The appellant failed to do this, and thus, there is nothing before this court to review.

V

The appellant, in his supplemental brief to this court, contends that his sentence

Exhibit A, State, 218 So. 2d 100, 171 (La.)

Cr. App. 1957)

The two objections made by counsel during argument were respectively in nature. The second need not concern any of the comments allegedly made by the prosecutor which the appellant asserts were improper. It is the duty of counsel during trial to discuss for reasons, arguments to be certain that the full language, deemed objectionable, is not taken to mean the propriety of such is presented in the record. Exh. A, State, 218 So. 2d 100, 171 (La., Cr. App. 1957) (objection failed). The appellant failed to do this and thus, there is nothing before this court to review.

The appellant, in his argument, failed to cite any authority that his contention

was disproportionate to the sentence received by his co-defendant, Farrell.

The appellant received a 21-year sentence in this case. Farrell pleaded guilty to possession of cocaine and received a 10-year sentence.

This court, in a similar fact situation, has previously addressed and adversely decided this issue to this appellant. See Maddox v. State, 502 So.2d 790 (Ala. Cr. App. 1986), cert. denied, 502 So.2d 794 (Ala. 1987). Applying the legal principles we set out in Maddox to the facts of this case, we find that the appellant's sentence was not disproportionate.

For the reasons shown, the judgment of the trial court is due to be, and it is hereby, affirmed.

AFFIRMED.

All Judges Concur.